DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-206893 DATE: March 18, 1983

MATTER OF: SBA Surety Bond Guarantee Program-Guarantee Fees

DIGEST:

The requirement in the regulations and the Surety Bond Guarantee Agreement that sureties pay the Small Business Administration (SBA) a surety bond guarantee fee is not a condition precedent to SBA's independent obligation to guarantee the surety against loss. Therefore, a surety's failure to pay the guarantee fee does not void SBA's obligation to honor its guarantee, although the surety remains legally obligated to pay the fee which, if unpaid, should be set off against the surety's claim.

This decision is in response to a request from the Director, Accounting Operations Branch, Small Business Administration (SBA), for our legal opinion as to whether SBA may honor claims of surety bond companies under its surety bond guarantee program when the surety company has not paid the surety bond guarantee fee. For the reasons set forth hereafter it is our view that a surety's failure to pay the guarantee fee does not void SBA's obligation to honor its guarantee.

As explained in the Director's letter, SBA's accounting officers are concerned that under one of our decisions (54 Comp. Gen. 219 (1974)) a Certifying Officer who approved payment of a claim for a loss suffered on an SBA guaranteed bond, for which the surety had not paid the required guarantee fee, would be performing an unauthorized and illegal act for which the certifying officer could be held personally liable. The Director referred specifically to the following language from the digest of that decision:

" * * * However, SBA has no authority to reimburse a bank for interim disbursements made to the borrower pursuant to such approval because of bank's failure to comply

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> with conditions, such as payment of guaranty fee, contained in both formal loan authorization which was issued after informal approval and blanket loan guaranty agreement between bank and SBA."

SBA's General Counsel, however, has taken the position that while sureties are required to pay the surety bond guarantee fee, payment of the fee is not a condition precedent to the existence of SBA's guarantee. It is the General Counsel's view that a valid guarantee arises "upon the issuance of the bond by the surety, irrespective of the payment of the guarantee fee". Of course, payment of the fee remains an enforceable obligation of the surety until it is paid.

The surety bond guarantee program is authorized by section 411 of the Small Business Investment Act, 15 U.S.C. § 694b (Supp IV 1980). Under this section SBA is authorized, subject to certain terms and conditions, to guarantee a surety against loss resulting from a breach of the terms of a bid bond, performance bond, or payment bond provided on behalf of an eligible small business principal on any contract up to $1 million. Subsection (h) of the section authorizes SBA to charge premiums or fees to sureties as follows:

> "The Administration shall administer this part on a prudent and economically justifiable basis and establish such fee or fees for small business concerns and premium or premiums for sureties as it deems reasonable and necessary, to be payable at such time and under such conditions as may be determined by the Administration."

Pursuant to this provision, SBA has adopted regulations, set forth in 13 C.F.R. Part 115, concerning the surety bond guarantee fee. Also, in addition to the provisions in the regulations, certain provisions contained in the Surety Bond Guarantee Agreement that each surety company must agree to also relate to the surety fee.

Although the submission from SBA indicated that the question about the legality of honoring the SBA guarantee when the surety fee has not been paid arose as a result of our decision in 54 Comp. Gen. 219, supra, our decision in that case barely touched on the guarantee fee requirement. However, our brief mention of that requirement in that

decision did lead SBA to make a subsequent request to us for a legal opinion that specifically dealt with the guarantee fee requirement in connection with SBA's guaranteed business loan program under 15 U.S.C. § 636(a). In our resulting decision--B-181432, March 13, 1975--we held that SBA could not purchase a guaranteed loan when the banks involved had not paid the guarantee fee before the loan went into default or before the bank had reason to believe that a default was imminent.

Our conclusion in that decision was based largely on the language of paragraph 2 of the Blanket Guaranty Agreement then in effect, which provided that "An approved loan will not be covered by this agreement until lender shall have paid the guaranty fee for said loan as provided in paragraph 5 of this agreement." Paragraph 5 of the agreement provided that the guarantee fee should be paid within 5 days of disbursement of the loan. Our decision of March 13, 1975, has been upheld in subsequent opinions issued by our Office. See, B-181432, November 12, 1975; B-181432, August 15, 1977; B-181432, July 7, 1978; B-181432, October 20, 1978, and B-181432, May 21, 1979.

In our October 20, 1978, decision, which resulted from a request by SBA to reconsider our original decision, we said that paragraph 2 of the Blanket Guaranty Agreement, which had been the primary basis for our original decision, was a material and unambiguous condition precedent to SBA's guarantee. All of our decisions in the loan guarantee cases turned on the provisions of paragraph 2 of the guaranty agreement to the effect that an approved loan was not guaranteed until the fee was paid. Thus, SBA could accept late payment, after the 5-day period referred to in paragraph 5 had lapsed, provided a default had not yet occurred or become imminent. For example, in B-181432, October 20, 1978, supra, we said the following:

> "* * * we have stated that we will not object to SBA's guaranteeing a loan where the required fee has been paid after the 5 days have elapsed. It is not the requirement that the fee be paid within 5 days of disbursement which we have considered to be the important and relevant condition precedent; rather, we believe that under the Guaranty Agreement, it is the payment of the guaranty fee any time prior to default (or knowledge of impending default) which is material to the agreement. * * *"

No comparable provision is contained in the Surety Bond Guarantee Agreement. As indicated in the quote below, 1/ Part I merely states that in consideration of the surety's payment of the guarantee fee and issuance of the bond, SBA will guarantee up to 90 percent of any resulting loss suffered by the surety. Neither this provision nor any other provision in the Surety Bond Guarantee Agreement says anything as to when the guarantee fee is due or, more importantly, indicates in any way that SBA's guarantee is conditioned upon prior payment of the fee. While it is clear that the surety is legally obligated under the Agreement to pay the guarantee fee to SBA, we do not believe that it is reasonable to interpret this requirement to be a

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1/ Part I of the Agreement contains the following provision:

> "The Small Business Administration, an agency of the United States Government hereinafter called SBA, pursuant to the authority contained in Part B of Title IV of the Small Business Investment Act, as amended, 15 U.S.C. sections 694a and b, and to the regulations issued pursuant thereto, and in consideration of Surety's payment of the SBA's guarantee fee and issuance of the bond(s) requested by the Principal, and in reliance upon the declarations contained in Part I and subject to the terms and conditions contained in Part II, agrees to guarantee the Surety against up to 90 percent of the loss it suffers as a result of the Principal's breach of the terms of the contract bonded."

Paragraph 4 of Part II of the Agreement provides as follows:

> "Surety shall pay SBA 20 percent of its bond(s) premium. Surety will pay SBA an additional like percentage of the additional premiums collected on any Contract amount increase of more than $5,000, and SBA will make a like percentage refund on any premium reductions resulting from a Contract amount decrease of more than $5,000."

condition precedent to SBA's independent obligation under the contract to honor its guarantee. Moreover, we believe, as Part I of the Agreement provides, that the legal detriment incurred by the surety in issuing a bond that it would not have issued without SBA's guarantee (13 C.F.R. § 115.6(b)), coupled with the continuing legal obligation of the surety to pay the required guarantee fee, constitutes adequate and valid consideration that will support SBA's obligation as guarantor under the Agreement.

Also, we note another distinction between the situation in our March 13, 1975, decision and the one involved here. When, in B-181432, October 20, 1978, supra, we affirmed our 1975 decision, we explained the background of SBA's adoption of the guarantee fee requirement upon which we based our decision as follows:

> "Furthermore, although SBA did not require lenders to pay the guarantee fee as a condition precedent to SBA's guaranty until January 1973, SBA has always charged this type of fee or its equivalent to lenders participating in SBA's guaranteed loan program as well as its predecessor--the deferred participation program. In fact, as explained by SBA in its original submission which resulted in our decision of March 13, 1975, the one-time guaranty fee provision that was adopted in 1973 was developed in order to resolve the administrative problems SBA had been having in collecting the fee. We were informally advised by SBA at that time that in some instances, lenders were not paying the guaranty fees until the borrower defaulted, at which time SBA was requested to and in fact did purchase the guaranteed portion of the loan. * * *"

That explanation is interesting for several reasons. First, it implicitly recognizes that a requirement that lenders pay SBA a guarantee fee need not be a condition precedent to SBA's liability under its guarantee. Second, it emphasizes the special problems that SBA had encountered in its business loan program that caused it to adopt language making the guarantee fee requirement a condition precedent. Based on the information contained in SBA's current submission, it does not appear that SBA has encountered similar difficulties in collecting the surety bond guarantee fees. This is consistent with its adoption

of language in the Surety Bond Guarantee Agreement that was not intended and should not be interpreted to make payment of the surety bond guarantee fee a condition precedent to SBA's guarantee.

We have issued two other decisions that considered the effect non-payment of insurance premiums would have on the Government's liability under a federally insured loan program. In 55 Comp. Gen. 658 (1976), as modified by 56 Comp. Gen. 279 (1977), we concluded that claims under the mobile home loan insurance program could not be paid if the loan default occurred or became imminent after the insurance premiums became delinquent. However, our conclusion in those two cases was based on the statutory requirement set forth in 12 U.S.C. § 1703 that premiums be paid "in advance". Accordingly, the holding in these cases is clearly not applicable here where the statute merely provides that the guarantee fees "be payable at such time and under such conditions as may be determined by the Administration."

Also, our position in this case is consistent with the view of the courts with respect to commercial insurance. It is generally recognized that an otherwise valid contract of insurance is not nullified by the nonpayment of premiums "unless the policy expressly so provides". See 14 Appleman, Insurance Law and Practice, § 8071, p. 376. Moreover, such forfeitures "are not favored by the law and unless clearly established will not be enforced." See 14 Appleman, supra, § 8071, p. 379; and cases cited therein.

In addition to examining the Surety Bond Guarantee Agreement, we have also considered the regulatory provisions that deal with the requirement that sureties pay a guarantee

fee.[2]/ We do not believe that any of these provisions are written in language that conditions SBA's surety bond guarantee on prior payment of the guarantee fee.

In this respect, we believe that our holding in another line of cases, also involving SBA's guaranteed business loan program, is elucidating. In B-181432, February 19, 1976, we considered whether SBA could purchase the guaranteed portion of a loan when the lender had not complied with the notice requirements which were set forth in SBA's regulations as well as in the Loan Guaranty Agreement. At the time our decision was issued, the applicable language set forth at 13 C.F.R. § 122.10(b)(1) (1975) provided as follows:

> "* * * * Notification to SBA within 30 days of any default is a condition precedent to the lending institution's demand for purchase by SBA. * * *"

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[2]/ The following provisions are relevant:

> "The surety shall pay SBA a guarantee fee equal to twenty percent (20%) of the bond premium. If there is a subsequent increase in the contract amount or an increase in the face amount of the bond, the surety will remit to SBA a supplemental guarantee fee of 20 percent of the additional premium charged. If the contract amount and bond amount are reduced SBA will refund 20 percent of the premium reduction. * * *" (13 C.F.R. § 119.9(b)).

> "SBA makes no charge for reviewing an application for a surety bond guarantee. Fees are payable both by the contractor and the surety once a final bond has been issued * * *." (13 C.F.R. § 115.5(b))

> "Surety must promptly furnish SBA with all required fees, financial and credit data, indemnities, and other data deemed necessary by SBA." 13 C.F.R. § 115.10(e)(3).

In our decision we held that this provision in the regulations, and similar language in the Guaranty Agreement, requiring lenders to notify SBA of an uncured default within 30 days was, as the regulations expressly provided, a condition precedent to SBA's obligation to guarantee the loan. (Although the Guaranty Agreement contained somewhat different language concerning the notice requirement we interpreted it to have the same legal effect as the provision in the regulations.) Accordingly, we said that we would take exception to any future payments SBA made to honor its guarantee with respect to defaults arising after the date of our decision if the notice requirements were not strictly complied with by the banks involved.

Subsequently, SBA amended the notice provision in the regulations and in its Loan Guaranty Agreement several times to increase the amount of time in which banks could notify SBA of a default and to change the legal effect of a bank's failure to comply. We issued several other decisions thereafter that considered the effect of the revised language. See B-188741, January 25, 1978; B-181432, September 4, 1979; and B-201388, September 23, 1981. However, in all of those decisions the basic rationale of our holding in the February 1976 decision was consistently upheld.

None of the provisions in the regulations governing the surety bond guarantee fee requirement are written in terms that are comparable to the regulatory provision we relied upon so heavily in B-181432, February 19, 1976, and the related cases. While we would agree that the guarantee fee provisions in the surety bond regulations, most notably in 13 C.F.R. § 115.5(b) and 115.10(e)(3), appear to contemplate that the guarantee fee would be paid promptly once the bond was issued, it is clear that neither of those provisions, nor any others, makes SBA's guarantee conditional on the prior payment of the fee by the surety. Accordingly, we do not believe that the surety's failure to pay the fee terminates SBA's guarantee obligation under the regulations and the Surety Bond Guarantee Agreement.

In accordance with the foregoing, it is our conclusion that the requirement that sureties pay a surety bond guarantee fee to SBA is not a condition precedent to SBA's obligation to guarantee the surety against loss. Therefore, SBA's guarantee should remain in effect even if a loss occurs before the guarantee fee has been paid. However, since the surety is legally obligated to pay the guarantee

fee, we believe that whenever this situation occurs SBA should set off and deduct the unpaid guarantee fees from the surety's claim. See 55 Comp. Gen. 658 and 56 Comp. Gen. 279, supra.

This, of course, will not help SBA in collecting any unpaid fees owed by sureties that do not suffer a loss and do not file a claim with SBA. In order to avoid any potential problems in the future in collecting these fees, SBA might wish to consider adopting the same kind of guarantee fee requirement for its surety bond guarantee program that it is currently following in its business loan program. See 13 C.F.R. § 120.3 (b).

Milton J. Socolar

for Comptroller General
of the United States